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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 516

THE OHIO OIL COMPANY, A CORPORATION,
Petitioner,
vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING.

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UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE OUT OF TIME

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner respectfully requests leave to file the attached petition for rehearing out of time for the reason that counsel was not aware of the recent change in Rule 33 until after the attached petition had been forwarded to the Clerk of this Court.

Respectfully submitted,

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Petitioner,

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING.

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner, The Ohio Oil Company, respectfully requests this Court to reconsider its decision handed down on February 9, 1948, denying petition for writ of certiorari in the above cause and in that connection says as follows:

Petitioner predicates its Petition for a Writ of Certiorari on the proposition that the United States Circuit Court of Appeals, Tenth Circuit, has decided important questions of Federal law, which have not been, but should be, settled by this Honorable Court. (Supreme Court Rule 38. 5. (b).) The decision of the Circuit Court of Appeals in the opinion of petitioner comes squarely within the purview of said Rule. If, in spite of the fact that Congress has intention-

ally withheld the granting of price-fixing power from the Secretary (see Congressional Record Vol. 58, pages 4733-4735, 66th Congress, 2nd Session), he can acquire same by the mere expedient of promulgating a departmental regulation, (thus, in effect, writing his own Act of Congress) approval of such assumption of authority should emanate from the highest Court in the land.

Realizing that this Court has many like petitions to consider, counsel for petitioner presented a compendious statement of the case so as to demonstrate that this is a case for the exercise of judicial discretion under said Rule 38. 5. (b). It was not our purpose to argue the merits of the case but to bring to this Court's attention the significance of the lower court's decision sustaining the asserted power of the Secretary of the Interior, proceeding under Federal law, to require an oil and gas lessee of Government land to pay the Government, as royalty, substantially more money than was received for such oil in admittedly bona fide sales in a fair and open market.

The amount of money involved here is of no particular consequence, but to petitioner the principle involved is of far-reaching significance. As we view this case, petitioner's property has been taken from it through the usurpation of power by an executive officer of the United States. Unless this Court intervenes, it can be expected that when it is to the advantage of the Government to do so, the Secretary of the Interior will again elect to take Government royalty oil in value and demand of petitioner and other Government lessees that it and they account to him for such oil on such basis as his judgment shall dictate, regardless of what price or prices such oil may actually bring on the market.

Under our system of government Congress is supposed to make the laws, and while, because of the complexities of our modern civilization, it has been found necessary to delegate to the executive branch the power to make rules

and regulations in order to more effectively carry out the mandates of Congress, yet we have not as yet come to the point where such law making powers have been entirely transferred to the executive branch. Congress intentionally withheld granting the Secretary of Interior the power to fix the minimum value of Government royalty oil. (R. 394.) By denying Ohio's petition for writ of certiorari, this Court leaves in effect the decision of the Circuit Court of Appeals holding Regulation 3(e) of the Department of Interior granting the Secretary of Interior such power to be *valid*. We believe the lower court erred and that petitioner has been illegally deprived of its property, contrary to the intent and purpose of the 5th Amendment to the Constitution.

Petitioner sincerely believes the Court has been misled by the distortion of facts and legal principles in respondent's opposing brief, and, as the quickness of the Court's decision after the filing of same did not permit the filing of a reply brief,¹ petitioner would briefly call the Court's attention to portions of said opposing brief.

Respondent would have this court believe that this case involves nothing more than a voluntary contract between the Secretary and petitioner, wherein petitioner agreed that the Secretary should have the exclusive power to determine the reasonable value of Government royalty oil, regardless of its actual market value (the amount petitioner actually received for such oil).

The portions of respondent's brief to which petitioner would particularly call the Court's attention are as follows:

1. Respondent's opposing brief states (p. 8):

1. Respondent's opposing brief was received at Casper, Wyoming, on February 4, 1948. Petitioner's reply brief was mailed to the printers on February 7, 1948, and this court denied the Petition for a Writ of Certiorari on February 9, 1948.

"The unit plan agreement recites that royalties 'shall be computed and paid in accordance with rules and regulations approved by the Secretary * * *' (R. 266) and that 'all development and operation under this agreement shall be subject to the operating regulations * * * in effect on December 1, 1936, * * *' (Par. I, R. 257)."

but does not refer to or set forth the italicized phrase immediately following:

" * * to the extent that such regulations are not inconsistent with the specific terms of the leases or of this agreement, particularly in the matter of rates of royalty * * *."* (R. 257.)²

nor to the significant paragraph XX (R. 270):

*"Nothing in this agreement contained shall be construed as a waiver by any party signatory hereto or consenting to this agreement of the right to assert any legal or constitutional right or defense as to the validity or invalidity of any law of the State of Wyoming, or of the United States, or regulations issued thereunder in any way affecting such party, * * *."* (Emphasis ours unless otherwise indicated.)

It is petitioner's contention that the above quoted provisions of such unit agreement had the effect of incorporating therein *only valid regulations* of the Secretary of the Interior which were *not inconsistent* with the specific terms of the leases or the unit agreement. The provisions of the unit agreement can afford no comfort to the respondent unless the Secretary may legislate unto himself or assume power to determine the reasonable value of Gov-

2. Regulation 3(e) (page 13, Respondent's Brief) is wholly inconsistent insofar as same requires royalties to be paid for at "such reasonable minimum price as shall be determined by said Secretary" with the royalty provision of the oil and gas lease which requires Ohio "to pay * * * a royalty * * * for all oil * * * produced (of) 12½%."

ernment royalty oil, by the mere promulgation of a departmental regulation unaided by statutory enactment. Resort cannot be had to the unit agreement to render valid that which is invalid. (See question No. 1, page 7 of Petition for Writ of Certiorari.)

It is also petitioner's contention that, absent statutory authorization, the Secretary cannot acquire such power by requiring as a condition to his approval of the unit agreement that provision therefor be included in such agreement. (See question No. 2, page 7 of Petition for Writ of Certiorari.) Congress in this instance intentionally withheld such authority. When Congress has intended to grant authority of like nature, it has specifically so provided by law. (See Act of August 30, 1935, c. 825, 49 Stat. 1011, 40 U. S. C. 276a, wherein provision is made for the inclusion in construction contracts of provision "stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar * * *.") In the absence of similar provisions in the Mineral Leasing Act, and amendments thereto, (and there is none) the Secretary of the Interior is without authority to include provisions in contracts granting himself the power to fix the minimum value of royalty oil. (See *Gillioz v. Webb*, 99 Fed. 2d 585, 586, (C. C. A. 5); *U. S. v. Morley Construction Co.*, 17 Fed. Supp. 378, 388, (W. D. N. Y.),) The inclusion of any such provision in a contract, without statutory authorization, "is of no weight."

2. Respondent's opposing brief states (p. 9):

"Thus, by contract the parties agreed that for royalty-computing purposes, the value of production was not to be less than the reasonable minimum value determined by the Secretary."

and

"There is clear statutory authority for the Secretary so to contract."

but so arranges its presentation as to attempt to leave the impression that the Secretary could by contract write out of existence the specific provision of the lease which required Ohio "to pay * * * a royalty * * * for all oil * * * produced (of) 12½%," and the specific saving clause of the Act of August 21, 1935 (quoted p. 12, Petition for Writ of Certiorari) which will not permit the impairment of that or any other right granted by the lease.

3. Respondent's opposing brief states (p. 10):

"There is no claim or finding in the case that the Secretary's determination of \$1.02 per barrel is fraudulent or dishonest. From that standpoint, therefore, the determination is binding on Ohio."

The quoted statement is an attempt to keep the Court from answering the very important Federal Question 3 (p. 7 of Petition for Writ of Certiorari), which has not been, but should be, settled by this Court; in that the statement would lead the Court to believe that petitioner must, as a prerequisite to obtaining relief, use words (such as the above statement invites) which would be mere legal conclusions from facts properly pleaded and proved. Such statement would have this court approve a legal fraud by disregarding fundamental legal principles (recognized by the Secretary himself in all except the last phrase of his Rule 3(e)) by affirmation of a situation in which the "reasonable minimum price as shall be determined by said Secretary" is greater than "the gross proceeds accruing to the lessee from the sale" of oil and is greater than "the highest price per barrel * * * paid or offered * * * at the time of production *in a fair and open market* for the major portion of like quality oil * * * produced and

sold from the field where the leased lands are situated;" (see Rule 3(e), p. 13, Respondent's Brief).³

Assuming the Secretary possesses the asserted power, petitioner submits that in exercising same he cannot arrive at a figure which ignores the actual conditions facing operators in the Lance Creek Field. We cannot determine what went on in his mind; we can only judge him by his words and actions. The mere fact that he might honestly believe in the rightfulness of his acts (which respondent nowhere claims) is no answer to petitioner's contention that it has been illegally deprived of \$9,186.96 by his arbitrary and capricious action of demanding \$1.02 per barrel for oil worth no more than 77¢ per barrel in a fair and open market.

4. Respondent's opposing brief also states (p. 10):

"If Ohio wished to attach the Secretary's value determination as unreasonable, it was obligated first to show the basis of the Secretary's action."

in an attempt to cover up the true ultimate result and effect of such "value determination"; the uncontroverted evidence herein establishes a market value of 77 cents per barrel at Lance Creek and therefore the "value determination" of the Secretary becomes arbitrary and unreasonable as a matter of law without any showing except that

3. In the case of *United States v. General Petroleum Corporation* (D. C. Calif.) 73 F. Supp. 225, the United States did not dispute the meaning of "value" (see paragraphs 3, 4, p. 235). "Value", in common usage, means "reasonable market value"; that price which a product will bring in an open market, between a willing seller and a willing buyer. *The parties do not dispute this interpretation of the term.* Thus the lessees are obligated to return to the government the specified percentage of the reasonable market value * * * of the oil produced."

(P. 249) "Months of trial were consumed in presenting evidence upon the single issue of whether or not there was an open market for oil at Kettleman Hills," but in the case at bar the fair and open market at Lance Creek is not controverted. (R. 4 and R. 12.)

such "value determination" was in excess of the market value. The ultimate result, reached by the Secretary, of itself shows there was no factual basis or support in law or equity for same. The cases cited by respondent on this point are wholly inapplicable. The cases of *Mississippi Valley Barge Co. v. U. S.*, 202 U. S. 282, 286; *Edward Hines, Trustees v. U. S.*, 263 U. S. 143, 148, were Interstate Commerce cases, where the district courts are given the express statutory authority to "enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission". (28 U. S. C. 46.) In such cases the Court could no more determine that the decision was not supported by the evidence without the whole evidence of the trial before it, than this Court could do likewise in the instant proceedings. But petitioner did not *appeal* from the Secretary's decision. This is a suit against the United States, on the theory that it, through its servant, the Secretary, acted arbitrarily.

A study of this record will disclose that the Secretary in making his finding of value had available for his consideration not only the testimony presented by petitioner and others but secret reports made to him by the Geological Survey (R. 61) and none of them were in the "transcript" which the Secretary's reporter made up and delivered to petitioner. This Court will take judicial notice that it is well established practice in matters of this sort for the Secretary to seek information wherever he can find it. Petitioner in this sort of "Star Chamber proceeding" had no way (and has no way now) of determining just what "evidence" the Secretary relied upon in reaching his decision on value, much less introduce same into the record in this case. All it could do was to present to the trial court all evidence available which was relevant on the question of market value. This it did. *The Government offered nothing on market value.* Granting the trial court would not be justified in ignoring the factual basis on which the

Secretary proceeded, yet as the only evidence presented to the court by both sides showed without peradventure that the only market available for oil produced in the Lance Creek Field was at a price of 77 cents per barrel, it is submitted that the trial court was absolutely justified in holding that the Secretary's minimum value of \$1.02 per barrel was "in excess of the value thereof and in excess of the price Plaintiff received therefor, was unlawful, inequitable, arbitrary and unreasonable." (R. 41.)

Right and justice does not permit going outside of a fair and open market to determine the value of a commodity sold therein. The Secretary's \$1.02 valuation is therefore arbitrary and unreasonable as a matter of law and that being the necessary conclusion, it could be said, for the benefit of respondent, that the Secretary's action is dishonest and fraudulent in law. The fair and open market at Lance Creek is admitted in the pleadings; moreover, the uncontested evidence herein conclusively proves that the value of oil at Lance Creek was 77 cents per barrel, consequently the requirement that Ohio pay royalty on the basis of \$1.02 per barrel is arbitrary, capricious and fraudulent as a matter of law because there can be no rational basis to support it and because there is no difference of opinion as to the existence of a fair and open market at Lance Creek.⁴

4. "*Where personal property is without market value, then the law allows the next best evidence to be given to ascertain its value. In such cases, evidence as to cost and other considerations which may affect value or which tend to show its worth, actual, real, or intrinsic, is admissible. It is necessary, however, before such proof may be given, that it appear that the property had no market value; in other words, lack of market value is a necessary condition to the admissibility of evidence of intrinsic or actual value,*" * * * 20 Am. Jur. 339.

"It has been held that if there is no open market in the place where an article ordinarily would be sold, then the market value of such article in the nearest open market, less cost of transportation

5. Respondent's opposing brief states (p. 11):

"Ohio insisted the 77-cent price posted at Lance Creek field was controlling, but the circuit court of appeals could find no justification for the 25-cent differential since the record before it showed that 'oil of inferior grade and quality, produced in the same country, and transported to the same markets under similar conditions as the Lance Creek oil, sold at \$1.02 (the value fixed by the Secretary) per barrel.' (R. 400.)"

The record does not support either Government counsel or the circuit court of appeals in the intended impression left by this statement. There were no "markets" away from Lance Creek to which resort could be had because there was a fair and open market at Lance Creek through which 16,000,000 barrels of oil was sold at 77 cents per barrel. There is nothing in the record showing that there was an "oil of an inferior grade and quality" sold at Lance Creek for \$1.02 per barrel and it is wholly irrelevant what prices may have been obtained in other "markets." There is nothing in the record which would permit the receipt in evidence of any testimony of a market price or value other than at Lance Creek, Wyoming, because the necessary condition to the admissibility of lack of fair and open market at Lance Creek had not (and could not) have been shown.⁵

to such open market, becomes the market value of the article in question." (*U. S. v. General Petroleum Corp.*, *supra*, p. 263.)

"Words 'arbitrarily' and 'capriciously' are used merely to characterize conclusion not supported by substantial evidence or contrary to substantial competent evidence." *Ostler v. Industrial Commission of Utah*, 84 Utah 428, 36 P. 2d 95.

5. See Wigmore on Evidence, 3rd Ed., Sec. 463:

"When the conduct of others indicating the nature of a salable article consists in offering this or that sum of money, it creates the phenomena of value, so-called. For evidential purposes, Sale-Value is nothing more than the nature or quality of the article as measured by the money which others show themselves willing to lay out in purchasing it. Their offers of money not merely indicate the value; they are the value; i.e.

Petitioner contends that the trial court reached a correct result and that the Circuit Court of Appeals erroneously reversed its judgment. It is a matter of public importance that this court determine (1) to what extent an official of the Executive Department of our Government may create in himself power which Congress had intentionally withheld, and (2) whether, if the power to fix and determine the reasonable minimum value of Government royalty oil could be conceded, the Secretary of the Interior may validly fix the reasonable minimum value of such oil at an amount in excess of the amount actually received for it by a Government lessee in a fair and open market. This Court should reconsider its decision and grant said Petition for Writ of Certiorari.

Respectfully submitted,

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Since value is merely a standard or measure in figures, those sums taken in net potential result are that standard."

And at Sec. 717:

"Value is, of course, the rate at which an exchange would in fact be made at this moment by the purchasing and selling community; hence a knowledge of what an article ought to exchange for is not a knowledge of value,—at least, in the sense in which Courts regard it. Nor is a knowledge of the various qualities and uses of an article sufficient, if it stops short of including the exchangeable rate which these qualities actually give it."

CERTIFICATE OF COUNSEL.

The undersigned attorney for petitioner The Ohio Oil Company does hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay and that the intervening circumstance of substantial or controlling effect on this Court was the perversion and distortion of facts and law presented in respondent's opposing brief to which petitioner was not permitted to make a timely reply contrary to Rule 38.4.(a) of this Court.

Moreover, another substantial ground for granting its petition for writ is available to petitioner, although not previously presented, to-wit:

There is a direct conflict between the decision of the Tenth Circuit Court of Appeals in this case and the decision of the Eighth Circuit Court of Appeals in the case of Barnsdall Refining Corporation v. Cushman-Wilson Oil Co. (97 Fed. 2d 481), on the question of what is meant by the term "value". The Eighth Circuit Court of Appeals held that "value" in common usage, means reasonable *market* value (that price which a product will bring in an open market, between a willing seller and a willing buyer); the Tenth Circuit Court of Appeals held herein that "value" does not mean reasonable *market* value.

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